

26 April 2019

Hon Sir Terence Arnold QC
Rt Hon Sir Geoffrey Palmer QC
He Uiringa i a Inquiry into Operation Burnham
PO Box 12008
Wellington 6011

Dear Sir Terence and Sir Geoffrey

Review of classified/withheld material: Operation Burnham documents

1. In accordance with our appointment and instruction under the Inquiry *Procedural protocol for review of classified information / claims to withhold information from disclosure*, we are able to report that we have reached the point at which a second tranche of documents can be considered for release.
2. This tranche comprises various New Zealand Defence Force planning and reporting documents in various formats.
3. In accordance with paragraphs [5](a) and [5](b) of the *Protocol*:
 - 3.1. We have identified and assessed the claims to non-disclosure made in respect of those documents; and
 - 3.2. We have consulted with relevant Crown agencies – the Department of Prime Minister and Cabinet, the Government Communications Security Bureau, the Ministry of Foreign Affairs and Trade, the New Zealand Defence Force and the New Zealand Security Intelligence Service and also Crown Law – over those claims.
4. We have required the Crown agencies to indicate the specific and cogent grounds on which they seek to withhold passages of these documents and have tested those claims in accordance with paragraph [8] of the *Protocol*. As a result:
 - 4.1. The Crown agencies have withdrawn some claims to withhold and modified others;

- 4.2. We accept that the Crown has established cogent reason to withhold the remaining passages redacted from the copies as now marked and that that reason is not outweighed by public interest in disclosure; and
 - 4.3. We have reached agreement on the terms of gists of the withheld passages, so far as the material content can be described without giving rise to prejudice.
5. The detail of the grounds to withhold the particular passages is set out in the accompanying schedules. Because those schedules discuss the withheld content, that detail is required to be classified according to the classification of that content. Nonetheless, it is possible here to describe the grounds for withholding that we have now accepted.
6. Most substantially:
 - 6.1. Several of the documents give identifying information for individuals believed to have been killed or wounded in the course of the Operation. As noted in the accompanying gist to those documents, some of that identifying information may correspond to identifying information now in the public domain. What remains potentially prejudicial to interests protected under s 70 of the Evidence Act 2006, however, is that:
 - 6.1.1. It is not possible to exclude the risk to wounded individuals and/or any individual named in error; and
 - 6.1.2. The means by which the New Zealand Defence Force obtained that identifying information at the relevant times in 2010 – for example, information provided through intelligence-gathering techniques – would still be at risk of prejudicial disclosure.
 - 6.2. Second, we have established that several passages and some imagery comprise information provided by other governments and/or by NATO that cannot be publicly disclosed without consent. In some respects, we were able to establish that those governments/NATO had already disclosed such information, such that no issue arose. For the remainder, the Inquiry may wish to consider seeking consent to disclosure if those passages are considered material.
7. Further, a number of short details have been redacted and where possible gisted. These comprise:

- 7.1. Names of individual personnel in the New Zealand and other armed forces, which would prejudice individuals' privacy and in some instances safety if disclosed;
 - 7.2. Unit names and other designations used by other countries' personnel, which would prejudice New Zealand's international relations with those countries if disclosed;
 - 7.3. References to unrelated operations, which are irrelevant here; and
 - 7.4. Some specific details of particular equipment used by other armed forces, such as the types of support aircraft used, which would if disclosed prejudice relations with those countries. Aircraft used for attack purposes have been identified.
8. As a result, the Inquiry may, as with the first tranche of documents, proceed to permit publication of these further documents as presently redacted, subject to the possibility of a ruling at some point in the future, or may choose to proceed towards a ruling at this point.
9. Last, we can also report that:
 - 9.1. We are currently seeking to confirm agreement on release of substantial material concerning Rules of Engagement so as to make that material available for the Module 2 hearing next month;
 - 9.2. We are awaiting final agreement on release of legal opinions concerning detention safeguards;
 - 9.3. We are working to reach agreement on further detention-related material in time for the Module 2 hearing; and
 - 9.4. We are working through two further tranches of documents:

and will advise further as soon as we are able on each of these.

Yours sincerely



Ben Keith / David Johnstone
Special advisors